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No. 01-1223

APR 20

In the Supreme Court of the United States

DICO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that persons responsible for hazardous substance contamination are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a). The questions presented are:

1. Whether the court of appeals correctly concluded that the district court did not abuse its discretion in denying petitioner's motion to exclude the testimony of an expert witness under Federal Rule of Evidence 702.

2. Whether the court of appeals correctly ruled that the United States was entitled to recover: (a) the costs it incurred in overseeing remedial activities conducted by private parties; (b) its indirect costs of the remedial action; and (c) litigation expenses associated with the remedial action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 266 F.3d 864. The district court's order on liability (Pet. App. 45a-79a) and its order on response costs (Pet. App. 32a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2001. A petition for rehearing was denied on November 27, 2001 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action against petitioner Dico, Inc., under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the government's costs in responding to petitioner's release of hazardous substances that caused groundwater contamination and threatened the public water supply of Des Moines, Iowa. The United States District Court for the Southern District of Iowa ruled that petitioner was liable for the government's response costs and entered judgment in the amount of $4,129,426.67. See Pet. App. 43a. The court of appeals affirmed. *Id.* at 3a.

1. Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). That statute, which Congress revised and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). CERCLA "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see *Bestfoods*, 524 U.S. at 55-56 & n.1.

CERCLA provides the President (acting primarily through the Environmental Protection Agency (EPA), see Exec. Order No. 12,580, 3 C.F.R. 193 (1987)) with several alternatives for cleaning up hazardous substance sites. Under Section 104, EPA can itself undertake response actions, using the Hazardous Substances

Superfund. See 42 U.S.C. 9604; see also 26 U.S.C. 9507; *Bestfoods*, 524 U.S. at 55. In such cases, EPA can recover its response costs from responsible parties under Section 107(a) through a cost recovery action. 42 U.S.C. 9607(a). Alternatively, under Section 106(a), EPA can seek, through an administrative order or a request for judicial relief, to compel the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a).

Section 107 of CERCLA, 42 U.S.C. 9607, "sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert." *Key Tronic*, 511 U.S. at 814. Under Section 107(a)(4)(A), responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." 42 U.S.C. 9607(a)(4)(A). The national contingency plan (NCP), which EPA promulgated as a regulation pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, prescribes methods for investigating the nature and extent of releases or threatened releases, and for planning and selecting response actions. See 40 C.F.R. Pt. 300.

Section 101(23) of CERCLA defines the terms "remove" and "removal" to include, among other things:

> the cleanup or removal of released hazardous substances from the environment, * * * such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, * * * or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. 9601(23). Section 101(24) defines the terms "remedy" and "remedial action" to include, among other things:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment * * *. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, * * * cleanup of released hazardous substances * * *, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

42 U.S.C. 9601(24). The terms "remove," "removal," "remedy," and "remedial action" describe "response" actions, and all such terms "include enforcement activities related thereto." CERCLA § 101(25), 42 U.S.C. 9601(25).

In establishing that a responsible party is liable for response costs, the United States need not prove that the party is the only source of the contamination or that the releases occurred in any particular amount. See, *e.g.*, *Stewman* v. *Mid-South Wood Prods. of Mena, Inc.*, 993 F.2d 646, 649 (8th Cir. 1993). The responsible party's liability to the government is joint and several, except to the extent that a defendant can establish, by a preponderance of the evidence, that there is a "reasonable basis" on which to apportion liability or to establish distinct harms. See, e.g., *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 902-903 (5th Cir. 1993); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Northeastern Pharm. & Chem. Co. (NEPACCO)*, 810

F.2d 726, 732 n.3 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

2. The United States brought this action against petitioner to recover the government's response costs associated with the remediation of groundwater contaminated by trichloroethylene (TCE) that was released from petitioner's manufacturing facility. Pet. App. 3a. The government specifically sought recovery of costs associated with "Operable Unit 1" (OU-1) of the Des Moines TCE Site. *Id.* at 3a, 51a-53a. Following a bench trial, the district court entered findings of fact and conclusions of law holding petitioner liable for the government's response costs. *Id.* at 45a- 75a. The court thereafter concluded that the government was entitled to the full amount of costs that it had requested. *Id.* at 32a-44a.

The district court based its liability ruling on extensive scientific evidence submitted at trial respecting the migration of TCE from petitioner's facility into the groundwater supply. That ruling sets out findings of facts describing petitioner's use and release of TCE, Pet. App. 46a-51a, EPA's discovery and investigation of the contamination, *id.* at 51a-53a, and the scientific evidence linking petitioner's activities with the groundwater contamination, *id.* at 54a-58a. Based on those findings, the district court concluded that petitioner's spillage and disposal of TCE caused the groundwater contamination that led to the government's incurrence of response costs. *Id.* at 58a-75a. The district court specifically rejected petitioner's contention that scientific testimony from the government's expert witness, John Robertson, should have been excluded as insufficiently reliable under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See Pet. App. 64a-70a. To the contrary, the court "f[ound] his testimony

to be both accurate and persuasive." *Id.* at 70a. See also *id.* at 58a (finding that the government's expert witness "presented logical, well-supported theories of liability" while petitioner's expert witness was "far less credible").

The district court ruled that the government was entitled to $4,129,426.67 in response costs based on the government's submission of affidavits and other documents setting out its expenditures for the response activities associated with the OU-1 portion of the Des Moines TCE Site. See Pet. App. 33a-38a. Relying on a prior ruling that constituted law of the case, the district court rejected petitioner's contention that oversight costs, indirect costs, and costs of attorneys' time are not recoverable under Section 107 of CERCLA as a matter of law. *Id.* at 39a. The district court further concluded that petitioner had failed to produce admissible evidence to counter the government's cost submissions or otherwise show that they were inaccurate. *Id.* at 39a-43a.

3. The court of appeals affirmed the district court's rulings on liability and response costs in their entirety. Pet. App. 2a-29a. The unanimous court rejected all of petitioner's numerous challenges to the district court's decisions. *Ibid.* Only two of the court of appeals' rulings are relevant to the petition for writ of certiorari.

First, the court of appeals held that the district court had properly denied petitioner's motion, under *Daubert*, to exclude the testimony of the United States' expert witness. Pet. App. 6a-12a. The court of appeals found that petitioner "has not pointed to any deficiency in the reliability of Robertson's testimony that would lead us to conclude the District Court abused its discretion." *Id.* at 12a. Rather, petitioner's objections merely "amount to an argument that the District Court should

have given more weight to [its] expert's interpretation of the data at issue." *Id.* at 11a-12a.

Second, the court of appeals rejected petitioner's contentions that Section 107(a) of CERCLA does not authorize the government to recover certain categories of response costs that were included within the district court's award. The court specifically concluded that Section 107(a) entitled the government to recovery of: (a) $730,060.74 in government oversight costs for remedial actions conducted by responsible persons at the government's direction; (b) $508,284.76 in indirect costs, such as overhead expenses of the Superfund program, attributable to the remedial actions at the site; and (c) $370,453.57 in costs of attorneys' time and other litigation expenses associated with recovering response costs at the site. Pet. App. 20a-27a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenges to the district court's exercise of discretion in admitting expert testimony and to its determination of recoverable categories of CERCLA response costs. The challenged rulings are consistent with established law, do not conflict with any decision of this Court or another court of appeals, and do not present issues otherwise warranting this Court's review.

1. Petitioner claims (Pet. 12-21) that the court of appeals erred in finding that the district court acted within its discretion in admitting the testimony of the United States' expert witness. Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court of any other court of appeals. Instead, petitioner seeks review based on a fact-specific challenge to the district court's exercise of discretion in this particular case. That challenge plainly does not

present an issue of general importance warranting review by this Court. In any event, the court of appeals properly affirmed the district court's decision.

In determining the admissibility of expert witness testimony under Fed. R. Evid. 702, the district court must ensure that scientific or other technical testimony is relevant and reliable. *Daubert*, 509 U.S. at 589. The district court must specifically determine whether the expert "is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-593. The district court has "considerable leeway" in deciding how to determine the reliability of expert testimony, and its ruling on whether to permit expert testimony is reviewed for an abuse of discretion. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999).

In this case, the district court correctly concluded that the expert testimony clearly exceeded the *Daubert* threshold. See Pet. App. 66a. The government's expert applied established and accepted scientific concepts and methodologies to the issues in dispute. *Ibid.* Petitioner challenges the reliability of the government expert's conclusions, but the district court expressly found the government's expert "presented logical, well-supported theories of liability," while petitioner's expert was "far less credible." *Id.* at 58a. Indeed, the arguments that petitioner sets out in its request for review demonstrate that petitioner's supposed *Daubert* challenge simply "amount[s] to an argument that the District Court should have given more weight to

[petitioner's] expert's interpretation of the data at issue." *Id.* at 11a-12a.

a. Petitioner contends that Robertson programmed his computer model to exclude the possibility of contamination from properties north of petitioner's manufacturing facility and that the court of appeals improperly failed to address that error by wrongly concluding that Robertson's computer model did not form the basis for his conclusion that TCE contamination originated from petitioner's property. Pet. 13-14. Petitioner is mistaken. As the district court correctly found, Robertson properly accounted for flowage from the north by programming it into the model as recharge or rainfall. Pet. App. 66a. Furthermore, the court of appeals correctly recognized that Robertson did not use that model to support his opinion that petitioner caused at least some of the contamination. *Id.* at 8a. Rather, he used that model to support his opinion on the percentage of contamination for which petitioner was liable, in order to determine whether liability could be apportioned between petitioner and other parties. *Id.* at 62a n.1. Petitioner did not appeal the district court's ruling that liability was not divisible, and the court of appeals correctly concluded that Robertson's use of the computer model was immaterial to petitioner's appeal. Indeed, the court of appeals properly rejected in its entirety petitioner's claim that Robertson had failed to consider whether the contamination came wholly from north of petitioner's property, finding that Robertson's testimony "shows that he considered each piece of data that [petitioner] alleges he ignored." *Id.* at 8a.

b. Petitioner wrongly contends that Robertson's opinion—that "dense non-aqueous phase liquid" (DNAPL) beneath petitioner's property provided the source of continuing high concentrations of TCE—was

not credible. Pet. 15-16; see Pet. App. 54a, 63a (describing the significance of DNAPL). The district court correctly found that, in one test sample, DNAPL was found in concentration levels of about one percent which, under then-current professional standards, indicated that DNAPL was present. *Id.* at 64a. The court of appeals properly refused to disturb the district court's determination, additionally noting that Robertson's conclusions regarding the presence of DNAPL in the soil were supported by tests run by petitioner's own consultant and were consistent with that consultant's conclusion that DNAPL was probably present. *Id.* at 10a-11a.

c. Petitioner also asserts that data from deep-soil boring samples were insufficient to support Robertson's conclusion that there was continuous contamination from the soil surface to the groundwater. Pet. 18-19. That assertion, even if true, does not support petitioner's claim that Robertson's testimony should have been excluded. Both the district court and the court of appeals found that Robertson did not rely on those borings to support his opinion that releases from petitioner's operations contributed to the groundwater contamination. Pet. App. 10a, 69a. The district court concluded that the government established causation even in the absence of the testimony on the deep soil borings. *Id.* at 69a. Furthermore, the court of appeals correctly held that petitioner's challenges to Robertson's conclusions went to credibility and not to admissibility and therefore were matters for the trier of fact to decide. *Id.* at 10a. See, *e.g.*, *Hose* v. *Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995); *United States* v. *L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); *Jones* v. *Otis Elevator Co.*, 861 F.2d 655, 663

(11th Cir. 1988); *Breidor* v. *Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-1139 (3d Cir. 1983).

d. Petitioner improperly seeks to challenge the admissibility of Robertson's expert opinion regarding the penetration of TCE from sludge spread on the ground. Pet. 16-18. Petitioner argues that Robertson's opinion was contradicted by petitioner's expert and that Robertson offered no data for his conclusion that TCE penetrated the degreasing vat and concrete containment pit to contaminate the soil below. See *ibid.* Petitioner did not raise those issues in its *Daubert* challenge in the court of appeals. Instead, petitioner simply contended that the United States failed to meet its burden of proving that TCE from petitioner's operations contaminated the soil, a question it does not ask this Court to consider. See Pet. App. 15a-18a. In any event, the court of appeals correctly concluded that record evidence contradicted the testimony of petitioner's expert regarding the penetration of TCE into the soil and that petitioner did not demonstrate that the district court clearly erred in crediting Robertson's testimony over the conflicting testimony of petitioner's expert. *Id.* at 17a-19a.

2. Petitioner contends (Pet. 22-29) that the court of appeals' "imposition of indirect and oversight costs" in this case conflicts with the Third Circuit's decision in *United States* v. *Rohm & Haas Co.*, 2 F.3d 1265 (1993). Petitioner is mistaken. The court of appeals disagreed with the Third Circuit's analytical approach to oversight costs, but it determined that this case presented a distinguishable issue and that the same result would obtain in this case, in any event, under the Third Circuit's analysis. Pet. App. 21a-24a. The court of appeals also correctly rejected petitioner's arguments respecting recovery of indirect costs and litigation expenses,

id. at 24a-26a, and those rulings do not present any basis for alleging a conflict among the courts of appeals.

a. CERCLA entitles the government to collect "*all costs* of removal or remedial action incurred by the United States Government * * * not inconsistent with the national contingency plan." CERCLA § 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A) (emphasis added). The Third Circuit nevertheless ruled in *Rohm & Haas* that CERCLA's definition of a "removal" action, see CERCLA § 101(23), 42 U.S.C. 9601(23) (set out at p. 3, *supra*), does not include government oversight of a private party's removal activities. That court concluded that the courts should interpret the term "removal" in light of the so-called "clear statement" doctrine arising from *National Cable Television Association* v. *United States*, 415 U.S. 336 (1974). The Third Circuit held, based on its reading of *National Cable*, that Congress was required to clearly state that oversight costs are recoverable, and that "any ambiguity must be resolved in favor of the defendants." 2 F.3d at 1275. Applying that standard, *Rohm & Haas* held that CERCLA's definition of "removal" does not include EPA oversight of a private party's removal actions. *Id.* at 1278.[1]

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[1] The Third Circuit's decision reflects an expansive view of *National Cable* that this Court has not embraced. In *National Cable*, this Court addressed the Independent Offices Appropriation Act, 1952, ch. 376, Tit. 5, 65 Stat. 290, which authorized the heads of federal agencies to prescribe fees for "any work, service . . . benefit, . . . license, . . . or similar thing of value"; and provided that the fee was "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." 415 U.S. at 337 (quoting statute). The Court held that, "to avoid constitutional problems" of improper delegation of taxing

The court of appeals in this case "disagree[d] with the Third Circuit's analysis." Pet. App. 23a. It noted that the *National Cable* case involved the FCC's attempt, without specific congressional authorization, to impose user fees on parties regulated by the agency that were in the nature of tax assessments. See *ibid.* The court correctly recognized that the principle articulated in *National Cable* does not apply to a liability statute, such as CERCLA, that is expressly "designed to make parties responsible for introducing hazardous waste into the environment pay for cleaning up the messes they have created." *Ibid.* The court of appeals noted

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authority, it was necessary to construe the Act narrowly, to permit fees based solely on "value to the recipient." *Id.* at 342-344. Since then, this Court has limited the application of *National Cable* to the specific context of potentially unconstitutional grants of revenue generating authority. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989) (*National Cable* "stand[s] only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."); *Mistretta* v. *United States*, 488 U.S. 361, 373 n.7 (1989) (citing *National Cable* in stating that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.10 (1976) (*National Cable* does not limit the Secretary's authority to impose fees as one method of "adjust[ing]" imports, because the import statute did not pose any conceivable threat to the non-delegation principle.); see also *Weiss* v. *United States*, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring) (citing *National Cable* in stating that the Court has read certain statutes "narrowly to avoid annulling them as excessive abdications of constitutional responsibility").

that other courts had declined to follow the Third Circuit's *Rohm & Haas* analysis in analogous cases. *Id.* at 23a-24a (citing *United States* v. *Lowe*, 118 F.3d 399, 401-403 (5th Cir. 1997), and *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996)).

Nevertheless, the court of appeals correctly discerned that, whatever the merits of the Third Circuit's analysis, this case is clearly distinguishable from *Rohm & Haas* because it involves "remedial" actions, rather than "removal" actions. Pet. App. 24a. Echoing the view of the Tenth Circuit in *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 568 (1996), the court explained:

> [T]he Third Circuit only addressed CERCLA's language defining *removal* actions under [Section 101(23), 42 U.S.C. 9601(23)]. CERCLA defines *remedial* actions more broadly to include "any *monitoring* reasonably required to assure that such actions protect the public health and welfare and the environment." [Section 101(24), 42 U.S.C. 9601(24) (emphasis added by the court)]. This language provides the specific congressional delegation of authority to the EPA that the clear statement doctrine of *National Cable*, as interpreted in *Rohm & Haas*, seems to require. Thus, even under the more restrictive approach advocated by [petitioner], we would conclude that oversight and indirect costs are recoverable in remedial actions under CERCLA.

Pet. App. 24a. Thus, the court of appeals reconciled its decision with that of the Third Circuit, and there is no conflict on the issue presented here. The court of appeals' mere criticism of the *Rohm & Haas* decision does not give rise to a conflict. See, *e.g.*, *Black* v. *Cutter*

Labs., 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions."). And to the extent that the Third Circuit's *Rohm & Haas* decision might give rise to a conflict with *other* cases not before the Court, that conflict is not ripe for this Court's review. The Third Circuit should be allowed an opportunity to reconsider its decision in light of the criticism it has generated.[2]

b. Petitioner contends (Pet. 22) that the court of appeals' decision affirming an award of indirect costs is "in conflict" with *Rohm & Haas*, but that contention is baseless. The Third Circuit expressly stated in *Rohm & Haas* that "this case does not involve the issue of whether indirect, overhead costs associated with

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[2] The Tenth Circuit, like the court of appeals in this case, addressed *Rohm & Haas* in an action involving only "remedial" costs and similarly held that it need not reach the *National Cable* issue because oversight falls within that term under any standard. *Atlantic Richfield*, 98 F.3d at 568. That court nevertheless noted that *Rohm & Haas*'s application of *National Cable* "is questionable." *Ibid.* The Fifth Circuit has rejected *Rohm & Haas* in an action involving both removal and remedial costs. See *Lowe*, 118 F.3d at 401 (1997) ("[w]e agree with the government and find the interjection of the *National Cable* doctrine inappropriate to our consideration of this issue of reimbursement of oversight costs"). See also *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042-1043 (2d Cir. 1985) (stating, in a decision prior to *Rohm & Haas*, and without discussion of *National Cable*, that the State of New York's monitoring costs "in assessing the conditions of the site and supervising the removal of the drums of hazardous waste squarely fall within CERCLA's definition of response costs, even though the State is not undertaking to do the removal"); cf. *United States* v. *Hyundai Merchant Marine*, 172 F.3d 1187, 1190-1191 (9th Cir.), cert. denied, 528 U.S. 963 (1999) (holding, under a provision of the Oil Pollution Act that allows the Coast Guard to recover its costs of monitoring an oil spill cleanup conducted by responsible parties, that *National Cable* "do[es] not apply here").

government removal or remedial activity at a particular facility are recoverable under § 107(a)." 2 F.3d at 1273 and n.10. While *Rohm & Haas* notes that a number of courts have held that indirect costs *are* recoverable, it did not reach the issue, and there accordingly is no conflict among the court of appeals. To the contrary, the courts of appeals that have addressed the issue have uniformly held that indirect costs are recoverable. See *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-1503 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Chromalloy Am. Corp.*, 158 F.3d 345, 352 (5th Cir. 1998); *United States* v. *Ottati & Goss*, 900 F.2d 429, 445 (1st Cir. 1990); *B.F. Goodrich* v. *Betkoski*, 99 F.3d 505, 528 (2d Cir. 1996), cert. denied, 524 U.S. 926 (1998); see also *United States* v. *Hardage*, 750 F. Supp. 1460, 1502 (W.D. Okla. 1990), aff'd in part and rev'd in part on other grounds, 982 F.2d 1436 (10th Cir. 1992), cert. denied, 510 U.S. 913 (1993).

As the Sixth Circuit explained in *R.W. Meyer*, "the challenged indirect costs *are* attributable to its cleanup site in that they represent the portion of EPA's overhead expenses that supported the government's response action on Meyer's property." 889 F.2d at 1503. That court added that "the statute contemplates that those responsible for hazardous waste at each site must bear the *full* cost of cleanup actions and that those costs necessarily include both direct costs and a proportionate share of indirect costs attributable to each site." *Id.* at 1504. The court of appeals' affirmance of the district court's award of indirect costs in this case is consistent with the uniform case law, is correct, and provides no issue warranting further review.

c. Petitioner relegates to a footnote (Pet. 24 n.7) its argument that the United States should not be allowed to recover attorney expenses associated with collecting

its response costs. Petitioner merely asserts that *Rohm & Haas* should apply with "equal force" to that question. The courts of appeals, however, have uniformly held that the United States may recover costs of attorneys' time and other litigation expenses. Pet. App. 24a-25a; *United States* v. *Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998); *B.F. Goodrich* v. *Betkoski*, 99 F.3d at 528.[3]

The court of appeals' decision is correct. As the Ninth Circuit stated in *Chapman*, Section 107(a)(4)(A) of CERCLA "evinces an intent to provide for attorney fees because it allows the government to recover 'all costs of removal or remedial action' including 'enforcement activities' [under Section 101(25)]." 146 F.3d at 1175; see *B.F. Goodrich*, 99 F.3d at 528 (under Section 101(25), "the government's recoverable response costs properly include not only the obvious costs of remediation, but also include, *inter alia*, attorneys' fees"). The

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[3] This Court ruled in *Key Tronic Corp.* v. *United States*, 511 U.S. 809 (1994), that *private parties* may not recover litigation-related fees under CERCLA Section 107(a)(4)(B), which allows those parties to recover only "necessary costs of response" (42 U.S.C. 9607(a)(4)(B)). See 511 U.S. at 819. The Court left open, however, the question whether the United States may recover such fees pursuant to Section 107(a)(4)(A), which entitles the government to "all costs of removal or remedial action" (42 U.S.C. 9607(a)(4)(A)). The Court reasoned that "it would stretch the plain terms of the phrase 'enforcement activities' too far to construe it as encompassing the kind of private cost recovery action at issue in this case," but the Court withheld comment "on the extent to which that phrase forms the basis for the Government's recovery of attorney's fees through § 107." *Key Tronic*, 511 U.S. at 819. Cf. *id.* at 824 (Scalia, J., dissenting) ("I would read 'enforcement activities' in [Section 101(25)] to cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery under [Section 107] of CERCLA.").

court of appeals' decision does not conflict with any decision of this Court or another court of appeals and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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